

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

In the Matter of	)	
	)	
Implementation of the Telecommunications	)	
Act of 1996	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of	)	
Customer Proprietary Network Information	)	
and other Customer Information	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, As Amended	)	
	)	
	)	

**REPLY COMMENTS OF VERIZON ON SECOND FURTHER  
NOTICE OF PROPOSED RULEMAKING**

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I. Introduction and Summary

It is readily apparent from the language of the Act that Congress intended to give all parts of the former Bell companies' corporate families the same access to CPNI that other carriers have among their affiliates, without imposing an obligation to disgorge that CPNI to their competitors. And that access is, as nearly all parties agree, notice and opt-out. Although carriers should be able voluntarily to use opt-in, mandating opt-in within a corporate family would violate the carriers' First Amendment rights.

The claims of parties who argue that the general nondiscrimination provisions of section 272 somehow override the specific privacy provisions in section 222 are contradicted by the language of both sections and the holding of the Tenth Circuit. Under their scenario, a former

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<sup>1</sup> The Verizon telephone companies ("Verizon") are the local exchange carriers affiliated with Verizon Communications Inc. listed in Attachment A.

Bell company would either be precluded from sharing CPNI with its long distance affiliate without prior customer consent, which would violate the carrier's First Amendment rights, as the Court of Appeals held, or it would be required to disclose CPNI to third parties without prior written consent of the customer, which violates section 222(c)(2). Neither result is legally tenable. Moreover, their argument is also inconsistent with section 272(g), which expressly exempts joint marketing by a Bell company and its long distance affiliates from section 272's nondiscrimination requirements. And providing affiliates with access to CPNI in order to engage in joint marketing merely permits the carrier to give customers the "one-stop shopping" that Congress expressly permitted and that the public wants.

Likewise, the few parties who support adopting an "opt-in" approach for all use of CPNI ignore the long-standing record in this proceeding that makes clear that the public expects a company to deliver one-stop shopping and has no privacy expectation within the same corporate family. They completely fail to provide any evidence to the contrary, and instead simply assert (without support) that opt-out is insufficient. Such bald statements fall far short of demonstrating that opt-in is the least intrusive means of furthering the government's interest in maintaining privacy of telephone records and therefore fail to overcome the First Amendment right of the carrier to share the information with affiliates for marketing purposes.

II. There Is No Legal Or Policy Basis For Finding That Section 272(c)(1) Applies To CPNI.

Several parties repeat their thrice-rejected argument that the provisions of section 272(c)(1) of the Act control the use of CPNI by a carrier and its section 272 long distance

affiliates. *See* AT&T at 11-17, Nextel at 9-13,<sup>2</sup> ASCENT at 3-8, and WorldCom at 9-11.<sup>3</sup> They are wrong as a matter of both law and policy.

These parties argue that CPNI that is disclosed to the Bell companies' section 272 affiliates must be disclosed to competing long distance companies under the same terms and conditions. Their arguments run afoul of both the First Amendment and the express provisions of the 1996 Act. Under the Tenth Circuit decision, carriers cannot be required to adopt an opt-in approach, under which CPNI regarding a customer is withheld from separate affiliates unless the customer affirmatively approves. *See U.S. WEST, Inc., v. FCC*, 182 F.3d 1224, 1239 (10<sup>th</sup> Cir., 1999) (an opt-in requirement "violate[s] the First Amendment"). Even AT&T agrees that requiring opt-in raises substantial Constitutional concerns, *see* AT&T at 3-9, and the other parties that address the section 272 issue express no disagreement with that conclusion.<sup>4</sup> It is

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<sup>2</sup> Nextel appears to suggest that section 272 nondiscrimination provisions somehow apply to a Bell company's CMRS affiliate. Nextel at 10 and 12. Of course, that is not correct, as section 272 addresses only the affiliate established to originate interLATA telecommunications services, to engage in manufacturing, and for other activities for which the affiliate requirements have sunset. *See* 47 U.S.C. § 272(a)(2). CMRS is considered an incidental interLATA service under section 271(g)(3) and is exempt from the separate affiliate requirement under section 272(a)(2)(B)(i). Section 272(c), by its terms, applies only to the Bell companies' separate affiliate required under section 272(a).

<sup>3</sup> WorldCom also argues that local CPNI should be disclosed to facilitate *local* market entry, citing its pending further reconsideration petition in this proceeding. WorldCom at 7-9. That request should again be denied for the same reasons the Commission has denied it twice already. That is, that WorldCom is attempting to gain access the CPNI as a third party without prior written consent of the customer, in violation of section 222(c)(2) of the Act. Grant of WorldCom's request would therefore gut the privacy provisions of section 222 by giving a carrier unfettered access to the CPNI of another carrier. *See* Opposition of Bell Atlantic to MCI WorldCom Petition for Further Reconsideration at 4-5 (filed Dec. 2, 1999), citing *Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 8061, & 23 (1998); *Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd 14409, && 86-89 (1999).

<sup>4</sup> Verizon will address below the claims of the only two parties that argue that the Commission can lawfully require opt-in. Neither one raises the section 272 issue.

clear, and nearly undisputed by the parties here, that the Commission cannot lawfully require carriers to obtain prior consent from a customer before sharing CPNI with their own affiliates.

Most parties (including AT&T and WorldCom) advocate an opt-out approach as the best alternative consistent with the Constitutional mandates, as articulated by the Tenth Circuit. That approach, which allows carriers to share CPNI with affiliates upon giving customers notice and a reasonable opportunity to opt-out, could not lawfully be extended to non-affiliates, however. This is because section 222(c)(2) of the Act requires prior written consent of the customer before CPNI may be disclosed to third parties. None of the parties even attempts to show how their claim that section 272(c) “trumps” section 222 can be squared with the clear Congressional mandate that CPNI can be disclosed to third parties only with prior written customer authorization, a mandate which notice and opt-out clearly cannot meet.

Contrary to the claims of AT&T, WorldCom, ASCENT and Nextel, a reading of the language of Act reveals that Congress intended section 222 to stand on its own and not be superceded by section 272. Most of the provisions of section 222 apply to “all carriers.” Where Congress intended a provision of section 222 to apply to only a subset of carriers, it said so. Thus in section 222(c)(3) it applied the rules on disclosure of aggregated CPNI only to local exchange carriers. If Congress had intended to allow non-affiliated interexchange carriers to obtain access to CPNI disclosed to Bell companies’ affiliates without prior written request, it would have said so as well, but section 222(c)(2) contains no such exception. As a result, the parties’ argument that the nondiscrimination provisions of section 272(c) require disclosure of CPNI to competing interexchange carriers when it is disclosed to the Bell companies’ affiliate would run afoul of the express provisions of section 222 and could not lawfully be accepted.

By contrast, Commission confirmation that the provisions of section 222 apply to all carriers without exception is fully consistent with section 272. This is because section 272(g) permits the former Bell companies to engage in joint marketing with their long distance affiliates and, in section 272(g)(3), expressly exempts such marketing from the nondiscrimination provisions of section 272(c). No party disagrees that use of CPNI is a necessary and integral ingredient of joint marketing, because a customer cannot obtain one-stop shopping if the marketing arm cannot ascertain what services the customer already has, nor can the joint sales and marketing personnel even advise on complementary products without knowledge of the customer's existing service. Without such access, the express permission to engage in joint marketing will prove illusory. By exempting joint marketing from the nondiscrimination provisions of section 272(c), Congress showed its clear intention that the former Bell companies' long distance affiliates would be afforded access to CPNI without creating an obligation to share that information with non-affiliated interexchange carriers except as provided under section 222(c)(2).

Even if it were not a Constitutional requirement, allowing carriers to share CPNI within their corporate family, subject to notice and opt-out, is also good public policy. As even AT&T points out, restricting use of CPNI within a company would inhibit, not promote, competition. AT&T at 8. It would materially inhibit the carriers' ability to provide customers with packages of services and products that the Commission has recognized the public wants. Nearly all of the twenty-five commenters here share that view and urge the Commission to allow carriers to adopt a notice and opt-out regime. Moreover, as the records of this and prior CPNI proceedings clearly demonstrate, opt-out is consistent not only with customer expectations, but with this

Commission's approach in numerous other instances, without complaint or anticompetitive effects. *See, e.g.*, Verizon at 4-7, Qwest at 10-11, n.38.

AT&T claims, however, that these policies should not apply to the former Bell companies, because they obtain CPNI "through their monopolies." AT&T at 8. Both AT&T's premise and its logic are wrong, and AT&T's argument ignores customer expectations. First, before a former Bell company may enter the long distance market, the Commission must find that company has met the competitive checklist in section 271(c)(2)(B), the result of which demonstrates that the local market in a state is irreversibly open to competition.

Second, AT&T does not attempt to show how the source of the CPNI has any relevance to use of local CPNI in the long distance market. The Bell companies are entering a fully competitive interLATA market with a zero market share, competing against entrenched carriers, the largest of which is AT&T. When the Bell companies entered the CPE and enhanced services markets on an unseparated basis in competition to entrenched incumbents, the Commission afforded access to CPNI on an opt-out basis, with no adverse impact on competition, and AT&T provides no valid argument of why the same will not happen here.

Third, customers expect that all segments of a single company will have access to customer information in order to offer packages of complementary services and products. This is the precise reason Congress allowed the Bell companies and their interLATA affiliates to engage in joint marketing. Without access to CPNI, this Congressionally established policy will be illusory.

AT&T also ignores the fact that long distance competition was able to develop and thrive even though AT&T, the monopoly incumbent in both the local and long distance markets (pre-divestiture), was unrestricted on use of any of its CPNI to market long distance services. In

short, AT&T has not shown that the restrictions it espouses are needed to protect privacy, to foster competition, or to meet the needs of the public.

III. Parties Seeking Reinstatement of Opt-In Fail To Show An Overriding Government Interest.

Several parties claim that the Commission can lawfully re-adopt opt-in without running afoul of the Constitutional concerns which led the Tenth Circuit to vacate the Commission's earlier rule. The Electronic Privacy Information Center, et al. ("Joint Parties") claim that an opt-out approach is insufficient to protect the governmental interest in the privacy of CPNI. While they show that Congress has recognized the importance of privacy of customer records by adopting provisions for other industries that restrict sale of customer records to *non-affiliates*, the Joint Parties never attempt to show how use of CPNI *within a corporate family* was addressed by Congress, much less how it raises these privacy concerns. All of the examples the Joint Parties provide deal with disclosure of customer information to third parties, and most involve a notice and opt-out approach even for that disclosure. *See* Joint Parties at 2-4. In section 222 of the 1996 Act, Congress carefully balanced the public's desire for one-stop shopping, which entails access of CPNI within a corporate family, with the interest in privacy of CPNI, by requiring prior written authorization for disclosure to third parties. The Joint Parties have made no effort to show that allowing opt-out for use of CPNI within the corporate family is inconsistent with governmental privacy interests.

Likewise, the Competition Policy Institute ("CPI") argues that CPNI is so sensitive that opt-in is the least restrictive means to serve the governmental purpose in protecting the public's privacy. CPI at 3-4. The only example CPI puts forward to support its claim is in the banking industry, where, it claims, surveys have shown that opt-out has not been effective. *Id.* at 4-5.

CPI ignores the fact that opt-out has been the solution of choice for this Commission since the mid-1980s, and that, for more than a decade, it was in effect without complaint for CPE and enhanced services. It also ignores the record here showing that customers expect and want a company to use CPNI to offer complementary products and services without having to approve that use in advance. CPI fails to show how the governmental interest in privacy within an company and the needs of the public are best served through opt-in.

The Joint Parties further assert that opt-out notices are “vague, incoherent, and often concealed in a pile of less important notices mailed in the same [sic] from the same source.” *Id.* at 5. CPI echoes this claim and wants the Commission to prescribe the precise form and wording of the notice and to dictate the method by which a customer may respond. CPI at 8-9. Those parties ignore the fact that the Commission requires CPNI notices to clearly and completely notify customers of their CPNI rights, *see* 47 C.F.R. § 64.2007(f), and requires carriers to give customers a convenient means of opting out, such as a toll-free phone number, a detachable reply card, or an email address. *See Clarification Order and Second Further Notice of Proposed Rulemaking*, FCC 01-247, & 9 (rel. Sept. 7, 2001). They provide no evidence whatsoever that the opt-out notices that were used for more than a decade for CPE and enhanced services were inadequate or failed to enable customers to make an informed choice or provide any examples from the *telecommunications* industry. Instead, they claim that certain notices used in another industry, financial services, were “unintelligible.” Joint Parties at 5-6, CPI at 8. Not only is that claim not applicable to the telecommunications industry, the remedy for unintelligible notices is not to require opt-in or to adopt detailed regulations but to ensure that the notices are properly framed. So long as the notices include the information the Commission has already specified, and so long as the carrier provides one or more of the convenient means of opting out that the

Commission has adopted, there should be no concern that customers are unable to make an informed choice.

Mpower divides CPNI into two parts, claiming that “Customer Usage Information” is somehow more sensitive than “Customer Facilities Information,” and that the former should be subject to opt-in while the latter could be subject to opt-out. Similarly, CPI asks the Commission to segregate the “most sensitive” call detail information for special treatment. CPI at 6-8. The Act, however, does not make any distinction among types of CPNI but, instead, includes in the definition of CPNI both information on the customer’s service configuration and on usage of the services. *See* 47 U.S.C. § 222(h).

Moreover, attempting to make such a distinction would result in even greater customer confusion. As Verizon has pointed out, customers are already angered and confused by the CPNI rules when what they really want is one-stop shopping. *See, e.g.*, Comments of Bell Atlantic in CC Docket No. 96-115 at 4-6 (filed June 11, 1996). Attempting to distinguish between “facilities” and “usage” information, trying to define what is incorporated within each, and then establishing separate sets of rules for each subpart of CPNI would further confuse and anger customers and would be nearly impossible to administer.

Neither Mpower nor CPI has met its burden of showing that there is an overriding government interest in protecting the privacy of usage information that overrides the First Amendment rights of the carriers. Neither shows that dissemination of usage information within a company has any adverse effect on customer privacy. Mpower, however, claims that a proposal currently before the European Union Parliament somehow demonstrates the sensitivity of usage information. *See* Mpower at 5-6. That proposal, however, would restrict a company’s

use of various types of customer data – not just usage data – for marketing of any service. In addition, it has no probative value here for several reasons.

First, even if it had some relevance in the U.S., which, as shown below, it does not, the European Union proposal Mpower refers to is just that, a proposal. It is still being hotly debated within the European Union Parliament, and it is unclear what, if any, final rule will be adopted. Indeed, any final rule may include an opt-out provision for some, if not all, internal company use of the data.

Second, even the proposal Mpower cites does not support its argument. While the European Union proposal is not entirely clear in this regard, it appears to limit use of nearly all CPNI, not just usage information, for marketing without customer consent. Therefore, it does not make the distinction Mpower claims.

Third, whatever the European Union may ultimately adopt as consistent with customer expectations in Europe has little relevance in the United States. The proposal Mpower cites is for a new privacy statute to be enacted by European Union member countries, and we already have a statute that contains its own requirements. That statute draws clear lines between use of CPNI within a corporate family and sharing it with third parties. We also have Constitutional protections as upheld by the Tenth Circuit. Finally, there is a substantial record showing that customers' privacy expectations are not furthered by requiring opt-in for use of CPNI within a corporate family, with no distinction in customer expectations between various sub-parts of CPNI. In short, Mpower provides no valid justification for adopting opt-in for all or part of CPNI use within a company.

IV. Conclusion

The Commission should reject the claims of the parties regarding the scope of section 272 and deny those asking it to reinstate opt-in, as discussed above.

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THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States  
GTE Midwest Incorporated d/b/a Verizon Midwest  
GTE Southwest Incorporated d/b/a Verizon Southwest  
The Micronesian Telecommunications Corporation  
Verizon California Inc.  
Verizon Delaware Inc.  
Verizon Florida Inc.  
Verizon Hawaii Inc.  
Verizon Maryland Inc.  
Verizon New England Inc.  
Verizon New Jersey Inc.  
Verizon New York Inc.  
Verizon North Inc.  
Verizon Northwest Inc.  
Verizon Pennsylvania Inc.  
Verizon South Inc.  
Verizon Virginia Inc.  
Verizon Washington, DC Inc.  
Verizon West Coast Inc.  
Verizon West Virginia Inc.